Supreme Court, U. S.
FILED
SEP 11 1978
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM 1978

NO. 78-406

C. CAREY MATTHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 75-1134 CIV-CA

FILED
AUGUST 5, 1975

JOSEPH I. BOGART, CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI, FLORIDA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. CAREY MATTHEWS,
Defendant.

ORDER OF DISMISSAL

Petitioner, C. Carey Matthews has filed this Motion to Vacate and set aside sentence and adjudication and guilty plea pursuant to 28 U.S.C. 2255.

The Petitioner entered his guilty plea to Count 14 of a multi count indictment on January 7, 1972 before the Honorable Peter T. Fay being case No. 71-606 CR-PF. The plea was entered after a plea bargain in compliance with the standards set forth by the ABA. The agreement was basically that if the petitioner entered a plea to

Count 14 the remaining counts would be dismissed by the government. The government further agreed to recommend that petitioner be given a probationary period of five (5) years and not any incarceration, and the government further agreed to recommend that no fine be imposed upon the Petitioner.

The plea was entered per the provisions of the United States Supreme Court decision of *Alford v. North Carolina,* 400 U.S. 25 (1970).

The two grounds set forth in this petition are:

1. That the plea of guilty was coerced.

2. That the sentence, adjudication and guilty plea were in violation of Rule 11, in that a proper factual foundation had not been laid, as required by law.

As to ground one the Petitioner alleges his plea of guilty "was an involuntary act because of a threat conveyed to Matthews and in the belief that the Trial Judge Peter T. Fay, had conveyed through the prosecuting attorney, to movant's counsels and to movant, information that if the movant was going to trial, the other defendants having taken pleas in exchange for favorable sentences, that the said Judge 'would sentence movant, if convicted, to at least ten (10) years in prison.

This matter came up for hearing before the Honorable Judge Fay on June 13, 1975 and after hearing the subject matter of this present motion recused himself from consideration of this motion to vacate and the petition was sent to the Clerk for reassignment.

This petition was filed June 10, 1975 and the Petitioner states that he did not present this issue to the Court until this date as the first doubt he had that Judge Fay had not made the alleged threatening statement as conveyed to petitioners by the United States Attorney was when the Petitioner read a newspaper article April 24, 1974 and that this doubt was further substantiated because of the interest in justice manifested by Judge Fay during a January 10, 1975 hearing held on Petitioner's motion to terminate his probation.

In weighing the merits of petitioner's claims this Court considered the fact the Petitioner was an able attorney who was admitted to practice before both the Florida Bar and the New York Bar. Upon a close examination of the transcript of the entering of the plea this Court can only determine that it was freely and voluntarily given and the Court received the plea in full compliance with Rule 11 of FRCP and tenants of *Alford v. North Carolina.* At page 3 of the sentencing transcript it recites the following:

"THE COURT: Within the purview of that case, do you make this decision, though, freely and voluntarily?

MR. MATTHEWS: Yes, I do, Your Honor. I think that I have been treated with great courtesy by counsel.

MR. SONNETT: Thank you."

The above Mr. Sonnett being the same Assistant United States Attorney that Petitioner sets forth in this petition was the person who coerced the plea of guilty through fraud, deceit, trickery and coercion.

In two recent decisions of the Supreme Court of the United States; *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); and *McCarthy v. United States,* 394 U.S. 315, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1968) the essence of these decisions being that the sentencing Judge must quiet his doubts regarding the plea, and that a clear record of the proceedings be established. The Supreme Court has not mandated guidelines beyond those imposed by the Federal Rules of Criminal Procedure 11.

There is no claim by the petitioner that a plea bargain was not fulfilled to bring this case within the decision of *Santobello v. New York,* 1971, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 or even in a later United States Fifth Circuit Court of Appeals decision *Bryan v. United States,* 492 F.2d 775 (5th Cir. 1974) an en banc decision which arose from a pro se motion presenting a similar question as the one presented in this petition.

The Court of Appeals said:

> "Bryan had his day in Court on the issue of whether a bargain had been connected with his plea. Both he and his counsel denied that a bargain was involved 'directly or indirectly'. Section 2255 itself proscribes successive motions for similar relief and in the spirit of that bar we hold that record's positive 'no bargain' affirmation precludes the necessity to retry the issue."

In the *Bryan* case the court clearly stated that it is one thing to consider a silent record and another to consider an issue such as this where the record clearly

speaks for itself and the contention of a petitioner raises questions of the involuntariness of a plea. Again in the present case coercion was emphatically denied by petitioner and his attorneys standing with him, the trial court couldn't have given the petitioner more of an opportunity to speak. It is also clear from the record of the taking of the plea and subsequent appearances by the petitioner before the trial judge that the judge was most symphatic to the petitioner and gave him no cause to fear the bringing of any matter before the court.

The question such as raised by this petition was further settled by the courts when in *Frank v. United States,* 501 F.2d 173 (5th Cir. 1974), the court said:

> . . . . "Frank, like Bryan, testified without conflict or equivocation that no plea bargain had been made or promised, directly or indirectly . . . . We find this factor controlling in this appeal, and leave to other cases the determination of prisoner motions in the face of records silent on plea bargaining or indicative of specific motives to disclaim plea bargaining."

From an examination of the record by this court, it is clear that all of the facts brought out in this petition were known to the petitioner at the time of making the plea and that his plea at the time and under the specific facts of this case this course can only conclude that the plea when made was freely and voluntarily made by the petitioner. In *Alford,* Supra it was held that even if the plea was entered out of a fear of the possibility of a death sentence it would not afford a basis for relief. *Parker v. North Carolina,* 397 U.S. 790 (1970); *Brady v. United States,* 397 U.S. 742 (1970).

We now consider Petitioner's second contention, that there was not sufficient factual basis established for the plea. The determination of whether there is a factual basis for a plea of guilty need not rest solely upon evidence presented by the government; certainly the court is permitted to consider the Petitioner's testimony in making this determination.

The transcript of the taking of the plea and establishing factual basis recites the following beginning with page 8:

A. David A. Ross; I am a trial attorney with the Securities and Exchange Commission, Washington, D.C.

Q. Mr. Ross, in connection with your official duties, have you had occasion to conduct an investigation concerning Mr. Matthew's relationship to the State Fire and Casualty Company?

A. Yes.

Q. With regard to Count 14, which charges a securities law violation that occurred on or about January 10, 1968, would you please state the results of your investigation.

A. During the course of our investigation, after reviewing of documents and interviewing of witnesses, we determined that Mr. Matthews caused the mails to be used to distribute a proxy statement to State Fire stockholders on or about January 10, 1968,

which statement did not include certain material information regarding activities of Capital Bancshares and people connected with State Fire. This was in connection with a proposal to postpone a recapitalization plan for State Fire.

Q. What was Mr. Matthew's position with State Fire and Casualty Company at the time that proxy went out?

A. Mr. Matthews, our investigation showed, was the general counsel to State Fire, a director, a nominee for director, and I think that was it at the time, or possibly a vice president of State Fire.

Q. Are the factual allegations, as contained in Count 14, those that have been established by your personal investigation, interviews with witnesses, examination of corporate records and other records?

A. Yes.

Mr. Sonnett: We have nothing further at this time, your Honor.

THE COURT: Any cross-examination of this witness?

MR. BLOCK: No, your Honor.

THE COURT: Thank you, sir.

(Thereupon the witness was excused).

THE COURT: Anything else from either party?

MR. SONNETT: Just to clear up the record, I previously announced that at the time of sentencing the Government would dismiss the remaining counts of the indictment.

THE COURT: Yes. That was part of the agreement, as I understand it, and as I wrote it down.

MR. BLOCK: We have nothing further, Your Honor.

The trial court made inquiry factually precise enough to be within the ambit of the charges made against him and without any objections, deletions or additions requested by Petitioner or his attorneys. *United States v. Bethony*, 489 F.2d 91 (5th Cir. 1974). All parties involved in this matter agreed that to try the case could take weeks if not months and would defeat the motivation for plea bargaining and pleas of guilty. The requirements of the court is that the inquiry be factually precise enough and sufficiently specific to develop the defendant's conduct on the occasion involved was within the ambit of that defined as a criminal. *Jimenez v. United States*, 487 F.2d 212, (5th Cir. 1973).

The Petitioner had a hearing before the trial judge on his Petition for Termination of Probation on January 10, 1975 and during that hearing reiterated sufficient oc-

currences on his part to have established factual basis for his plea and this was still three years after his plea was entered and accepted by the court. At page 20 of his January 1975 hearing petitioner said:

> "Nevertheless, I understand that there were certainly various mistakes that I would not repeat in connection with the case. I would be a lot more suspicious and distrusting of persons for whom I was working and I have learned a good deal from the probationary period and everything that has ensued subsequent to it.
>
> I certainly would never take a job as a director or officer of a company that I knew very little about and as to which I knew practically nothing of the owners, particularly a public company. It's a grave mistake, because you become in a sense, in the sense of the Securities and Exchange Act — you become responsible as a director and an officer for everything they do.
>
> I recognize that far more fully and clearly than I did then."

The record clearly refutes petitioner's claims that his guilty plea was not entered freely and voluntarily with a full understanding of the nature and consequences thereof. The record clearly establishes that the petitioner understood the nature of the charge, that he entered his plea freely and voluntarily with a full understanding of the plea and there was a factual basis for the plea.

Under these circumstances it is unnecessary to require an evidentiary hearing to resolve petitioner's claims. *Traber v. United States*, 466 F.2d 483 (5th Cir., 1972); *Hunter v. United States*, 449 F.2d 156 (5th Cir. 1971).

For these reasons, it is

ORDERED AND ADJUDGED that the Motion to Vacate Sentence be and the same is hereby DENIED, and that this cause stands DISMISSED.

DONE AND ORDERED at Miami, Florida, this 2nd day of August, 1975.

/s/ Signature Illegible.
UNITED STATES DISTRICT JUDGE

cc: Bernard Hunter, Est.
1680 N.E. 125th Street,
North Miami, Florida 33181

Lloyd G. Bates, Jr.
Assistant U.S. Attorney
300 Ainsley Building
Miami, Florida

APPENDIX "B"

C. Carey MATTHEWS,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

No. 75-3497.

United States Court of Appeals,
Fifth Circuit.

June 9, 1976.

Motion was filed to vacate and set aside guilty plea on ground that it was coerced by reason of alleged threat from the trial court that defendant would receive at least a ten-year sentence if he did not plead guilty, which threat allegedly was conveyed by the prosecutor to movant's counsel and through that counsel to movant. The United States District Court for the Southern District of Florida, C. Clyde Atkins, J., denied motion without an evidentiary hearing, and movant appealed. The Court of Appeals, Dyer, Circuit Judge, held that although at time of sentencing movant stated that plea was not induced by any threats or coercion and although his counsel indicated that he had nothing to add to the proceedings, movant was entitled to an evidentiary hearing in view of counsel's sworn affidavit substantiating allegations that threatening statements had been made to him by the prosecutor, sworn affidavit of defendant's law partner stating that he was privy to such con-

versations and sworn affidavit of prosecutor that he did not make any such statements to counsel.

Reversed and remanded.

1. Criminal Law — 997.16(5)

Although at rule 11 colloquy defendant stated that guilty plea was not induced by threats or coercion, defendant was entitled to evidentiary hearing on motion to vacate and set aside plea on ground that it was coerced by reason of alleged threat from trial court that defendant would receive at least a ten-year sentence if he did not plead guilty where petition was supported by counsel's sworn affidavit substantiating allegation that such threatening statements had been made as well as sworn statement of defendant's law partner that the latter was privy to such conversations and sworn affidavit from the prosecutor denying any such statements. Fed.Rules CrimProc. rule 11, 18 U.S.C.A; 28 U.S.C.A. §2255.

2. Criminal Law — 997.16(5)

Allegations of a petitioner accompanied by his own affidavit are insufficient to mandate an evidentiary hearing on a petition to vacate and set aside guilty plea as being involuntary in face of a record, as made at time of guilty plea, detailing statements by petitioner that his plea was not induced by any threats or coercion. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.; 28 U.S.C.A. §2255.

3. Criminal Law — 997.11

It is not improper to refer to magistrate for his recommendation petition seeking to vacate and set aside guilty pleas. 28 U.S.C.A. §2255.

Appeal from the United States District Court for the Southern District of Florida.

Before DYER, SIMPSON and RONEY, Circuit Judges.

DYER, Circuit Judge:

[1] The sole question before this Court is whether the district court erred when it denied Matthews' motion under 28 U.S.C.A. §2255 to vacate and set aside his guilty plea without an evidentiary hearing. We conclude that under the particular facts or this case, an evidentiary hearing was required. We therefore reverse and remand.

Matthews was charged with multiple violations of the Securities Act of 1933, and the Securities and Exchange Act of 1934. After initially pleading not guilty to all counts, Matthews withdrew that plea and, pursuant to *Alford v. North Carolina,* 1970, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, he entered a plea of guilty to one count, notwithstanding his continuing assertions that he was innocent of the charges brought against him. The remaining counts were dismissed.

The Section 2255 petition alleged that Matthews was coerced into entering the guilty plea by reason of a threat conveyed by the Assistant United States Attorney heading the prosecution team to Matthews' coun-

sel,[1] and through that counsel to Matthews. The substance of the allegation related to a private conference between the Assistant United States Attorney and the district judge. Since all other codefendants had entered guilty pleas, and since the trial promised to be long, the district judge is alleged to have stated in this conference that Matthews would receive at least a ten year sentence if he did not enter a guilty plea and was subsequently found guilty by a jury. The petition states that this information was relayed to Matthews' counsel by the Assistant United States Attorney, and by Matthews' counsel to Matthews. Important to the outcome of this case, the petition was supported by a sworn affidavit signed by Matthews' counsel, substantiating the allegation that these statements were made to him by the Assistant United States Attorney. A sworn affidavit was also filed by Matthews' law partner, stating that he was privy to the conversation in which Matthews' counsel related these threats to Matthews. Subsequent to the filing of the petition, the government filed a sworn affidavit signed by the Assistant United States Attorney, stating that he had never had such a private conference with the district judge, and that he had never conveyed these statements to Matthews' counsel.

Faced with these conflicting sworn affidavits, the district court[2] nevertheless denied Matthews' Section 2255 petition without an evidentiary hearing on the basis of this Court's en banc decision in *Bryan v. United States*, 5 Cir. 1974, 192 F.2d 775. The district court

[1]Matthews is represented on the Section 2255 motion by different counsel.

[2]The district judge who received the guilty plea recused himself from consideration of the Section 2255 petition, and the petition was assigned to another judge.

noted that at the time of sentencing, a full Rule 11 colloquy took place, and Matthews there stated that his plea was not induced by any threats or coercion. His counsel, the same attorney alleged to have received the threat, was also present at the Rule 11 hearing, and, although not addressed directly by the court, indicated that he had nothing to add to the proceedings. In the view of the district court, *Bryan* precluded Matthews from challenging statements made by him in the plea proceeding so as to gain Section 2255 relief. Since he was bound by those statements, no evidentiary hearing was required, and the court could only conclude that his plea was freely and voluntarily entered.

In *Bryan*, this Court en banc drew a balance between the Section 2255 requirement that an evidentiary hearing is necessary unless the motions, files, and records of the case "conclusively show" that the prisoner is entitled to no relief, and the need for finality in the criminal process. As stated in *Bryan*, if a prisoner could challenge prior statements made at a Rule 11 hearing without limit, then

> the number of hearings which a wilful affiant could provoke as to a single conviction would be limitless, for each time he could swear that someone at the last preceeding hearing suborned false testimony from him or his lawyer or that the judge played false in the performance of his duties.

492 F.2d at 780. In reaching this balance, the court *did not* conclude that a Section 2255 petition could never challenge statements made at a prior plea proceeding. As this Court has stated:

> We do not view the foreclosure principle set forth in *Bryan* to constitute an absolute and ironclad rule that the "magic words" of the Bryan-Rule 11 examination completely eliminate the necessity for a hearing on a §2255 motion in all circumstances.

Vandenades v. United States, 5 Cir. 1975, 523 F.2d 1220, 1224. Rather, the Court carefully compared the facts before it to the precepts of the Supreme Court laid down in *Fontaine v. United States*, 1973, 411 U.S. 213, 93 S.Ct. 1461, 36 L.Ed.2d 169, and *Machibroda v. United States*, 1962, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473, both of which required an evidentiary hearing under the "conclusively show" standard of Section 2255. The Court pointed to several characteristics which distinguishes *Bryan* from *Fontaine* and *Machibroda*. First, *Bryan* did not involve allegations of threats or coercion which induced the plea, as in *Fontaine* and *Machibroda*. Second, unlike those two cases, *Bryan* supported his petition with only his own affidavit to counter directly inconsistent former testimony. Thus, *Bryan* is inapposite to the case now before us, where the petition alleges threats which coerced the plea, and where the petition is supported not only by the affidavit of the petitioner, but also by the affidavits of third persons. *See Vandenades, supra*, 523 F.2d at 1224, fn. 6.

[2] Subsequent to *Bryan* we have held that its principles are not limited to situations involving a traditional plea bargain, but that those principles also apply to a Section 2255 petition which alleges that the guilty plea was induced by threats or coercion. In this later situation, under the rationale of *Bryan*, the allegations of the petitioner accompanied by his own affidavit

are insufficent to mandate an evidentiary hearing in the face of a Rule 11 record detailing statements by the petitioner that his plea was not induced by any threats or coercion. *United States v. Barrett*, 5 Cir. 1975, 514 F.2d 1241; *Jackson v. United States*, 5 Cir. 1975, 512 F.2d 772.

Subsequent decisions have also held, however, that *Bryan* does not apply to eliminate the requirement of an evidentiary hearing when the petition is supported not only by the allegations of the petitioner, but also by credible third party affidavits or other documentary evidence. *Dugan v. United States*, 5 Cir. 1975, 521 F.2d 231; *Vandenades, supra*.

In *Dugan*, petition alleged an unkept plea bargain and was supported by affidavits of a county deputy and sheriff, stating that both state and federal officials had made promises to Dugan that he would receive a sentence of only four years. At the plea proceeding, the court questioned Dugan as to whether any promises had been made in connection with the guilty plea, and Dugan replied in the negative. This Court concluded that the existence of the supporting affidavits, rather than the negative response elicited at the plea proceeding, was controlling, and an evidentiary hearing was necessary to resolve Dugan's claim. The rationale of *Bryan* was found to be inapplicable when third party affidavits accompanied the petition:

> While allowing a petitioner to obtain an evidentiary hearing by merely alleging an unkept plea bargain would enable a wilful affiant to provoke as to one conviction endless hearings for each time he could swear that someone

at the last hearing suborned false testimony, *such rationale for denying a hearing does not control here.* See *Bryan v. United States*, 492 F.2d at 780. When the petitioner presents affidavits from third parties, the danger of repeated hearings no longer exists. . . . When petitioner goes beyond mere allegations by presenting credible affidavits that raise a substantial inference that an unkept bargain was in fact made, §2255 requires an evidentiary hearing.

521 F.2d at 233. *See also Vandenades v. United States*, *supra*, at 1223 ("when the record discloses other credible documentary evidence which indicates a right to relief an evidentiary hearing may be necessary").

The case before us is controlled by *Dugan*. Here, we have affidavits that raise a substantial inference that threats or coercion in fact induced Matthews' guilty plea. Of course, we make no attempt to resolve the conflict in the affidavits before us, nor do we intimate any view as to whether Matthews would be entitled to withdraw his plea if the allegations of his petition are in fact correct. But, as decided in *Dugan* those affidavits tip the balance drawn by *Bryan*. Matthews is entitled to an evidentiary hearing on his claim.

[3] Matthews also claims that there was an insufficent factual basis for the entry of this *Alford* plea. Further, he challenges the local procedure whereby Section 2255 petitions are referred to the magistrate for his recommendation. We find these assertions of error without merit.

REVERSED AND REMANDED.

APPENDIX "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 74-1134-Civ-CA

C. CAREY MATTHEWS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING MOTION TO VACATE SENTENCE

[Filed Oct. 13, 1976]

THIS CAUSE came before the Court on plaintiff's motion to vacate sentence. The motion is denied.

On September 2, 1976, this Court conducted an evidentiary hearing directed to the issue of whether the government induced plaintiff's guilty plea by means of threat vel non. Because plaintiff alleged that the threat was made by the government attorney to plaintiff's attorney over the telephone, the testimony of those persons is the relevant testimony before the Court. The subjective thoughts of plaintiff and his partner are not material to the issue.

After careful analysis of the testimony adduced at the hearing, and after consideration of the memoranda

submitted by both parties, it is the finding of this Court that although the attorney for the government may have speculated to plaintiff's attorney that his client would receive a lengthy sentence if convicted, there was no threat conveyed. Accordingly, it is

ORDERED AND ADJUDGED that the motion to vacate sentence is denied.

ENTERED at Miami, Florida this 13th day of October, 1976.

/s/ C. Clyde Atkins
United States District Judge

cc.
U.S. Attorney
Leo Greenfield, Esq.

APPENDIX "D"

C. Carey MATTHEWS,
Petitioner-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

No. 76-4244.

United States Court of Appeals,
Fifth Circuit.

March 20, 1978.

Motion was filed to vacate and set aside guilty plea on ground that it was coerced by alleged threat that defendant would receive a lengthy sentence if convicted. On remand, 533 F.2d 900, the United States District Court for the Southern District of Florida, C. Clyde Atkins, J., found that no threat had been made, and movant appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) finding was not clearly erroneous, and (2) defendant's subjective belief alone was not sufficient to invalidate the plea.

Affirmed.

1. Criminal Law — 1158(1)

In a proceeding to vacate and set aside a guilty plea the district court's finding of fact are to be upheld unless clearly erroneous. 28 U.S.C.A. §2255.

2. Criminal Law — 1158(1)

Finding that although prosecutor may have speculated to defense counsel that defendant would receive a lengthy sentence if convicted there was no threat conveyed inducing defendant to plead guilty was not clearly erroneous. 28 U.S.C.A. §2255.

3. Criminal Law — 273(1)

A defendant's subjective belief that he will receive a lengthy sentence if he goes to trial is not alone sufficient to invalidate a guilty plea. U.S.C.A. §2255; Fed.Rules Civ.Proc. rule 11, 18 U.S.C.A.

4. Criminal Law — 1181

Although more detailed findings on motion to vacate and set aside guilty plea might have been helpful, remand therefore was not required absent showing of prejudice. 28 U.S.C.A. §2255.

Appeal from the United States District Court for the Southern District of Florida.

Before JONES, RONEY and TJOFLAT, Circuit Judges.

RONEY, Circuit Judge:

This case initially came to this Court for determination of whether C. Carey Matthews was entitled to an evidentiary hearing on his §2255 claim that threats or coercion induced his guilty plea. Holding that an evidentiary hearing was required, we remanded the case

to the district court. *Matthews v. United States,* 533 F.2d 900 (5th Cir. 1976). This present appeal questions the district judge's finding, on remand, that no threat had been made. We affirm.

Matthews, a former member of the Florida legislature and former practicing attorney, charged with securities, mail and wire fraud, plead guilty to one count of a nineteen count indictment, at the same time asserting his innocence, a procedure specifically authorized by the Supreme Court's decision in *Alford v. North Carolina,* 400 U.S. 25, 92 S.Ct. 160, 27 L.Ed.2d 162 (1970). In return, the Government agreed to dismiss the other counts of the indictment and recommend five years probation, which Matthews received.

Matthews later brought the instant motion to vacate under 28 U.S.C.A. §2255, claiming his guilty plea had been coerced. He alleged the prosecutor had told his counsel that the trial judge said he would sentence Matthews to at least ten years imprisonment if Matthews went to trial and was found guilty. Matthews alleged that it was only after this threat that he decided to plead guilty.

We held that an evidentiary hearing was required to determine the truth of Matthews' assertions, because of conflicting affidavits of Sonnett, the prosecutor; Block and Mandina, Matthews' attorneys; and Matthews. At the evidentiary hearing, a district judge other than the trial judge who took the plea received testimony from these affiants.

The former prosecutor, Neal Sonnett, testified that at Block's request he had gone to see the trial judge to

determine whether or not the judge would accept an *Alford* plea. This short discussion with the judge was limited to that question. When the judge indicated he would accept the *Alford* plea, Sonnett reported that fact to Block, who had waited outside the judge's chambers. Sonnett denied that he had conveyed to Block any opinion about what the judge would do if the case went to trial. Sonnett did testify, "out of a sense of fairness to Mr. Block," that he could "understand the circumstances under which Mr. Block might have gotten this impression [that Sonnett knew something about what the judge intended]." But he immediately followed this by again categorically denying that he had ever indicated to Block the things that Matthews alleged.

Irwin Block, Matthews' former defense attorney, was the second witness. He testified that what he had said in his affidavit was true, "as far as it goes," but that it needed "elaboration" and Matthews' present counsel had "read something into it that is not contained there [since] nowhere [in his affidavit] was there any indication of any threats." Block said that during negotiations prior to trial, he and Sonnett had discussed what would happen if Matthews was convicted: Block thought Matthews would get either probation or a short prison sentence, and Sonnett thought that Matthews would get a long prison sentence. When Sonnett talked to him after leaving the judge's chambers, Block testified that "Somehow or other, I got the impression that there was some indication, no threats, no statements, but some indication from whatever was said, that the judge felt about this case the way that Neal [Sonnett] had indicated to me," i. e., that if convicted Matthews might get a long term of imprisonment. Block characterized

the impressions he had gotten from Sonnett as mere "laywer talk." He "at no time took it as a threat and [he] at no time conveyed it as a threat." Block said he had told Matthews that he was not even sure whether the judge had said anything, but he felt obliged to convey it to him.

Philip Mandina, Matthews' former law partner, was the next witness. He testified that he was with Matthews when Block called, and that he had participated in Block's call. He summarized the call by testifying that Block said specifically that he had a discussion with Sonnett and Sonnett had talked to the judge, who had indicated to him that if Matthews was found guilty on any one count he would give him at least ten years in jail. Mandina testified that he thought the call was "threatening in nature," but, significantly, he also said that Block had told Matthews that he did not think the judge had made the statement. Mandina said that he had not believed that the judge had made the statement either. He and Matthews discussed the situation, and Matthews decided that he could not take the chance, so he decided to plead guilty.

Matthews then testified in his own behalf. He said that he had been prepared to go to trial until he had received the call from Block. According to Matthews, Block said the judge had "threatened" a ten-year sentence, and this had not been an impression on Block's part but unequivocally what Sonnett had told him the judge had said. Matthews testified that while Block had told him Sonnett was politically ambitious and might be lying, Matthews believed the threat, because he could not afford to take a chance of not believing it and receiving ten years imprisonment. He also explained that he

had not mentioned the threat when questioned by the trial judge during the Rule 11 guilty plea hearing, at sentencing or when he had previously petitioned to terminate probation, because he believed the judge was "hostile" and would refuse to accept the plea and possibly give him an even harsher sentence if he spoke up. Matthews said he had finally brought the §2255 petition because he had become convinced by a newspaper article suggesting that Sonnett wanted a conviction in his case for political reasons, and by the judge's fair and compassionate attitude at the probation termination hearing, that the judge had not made the threat which Sonnett had conveyed to Block.

After hearing all of this testimony, the district judge found "that although the attorney for the Government may have speculated to plaintiff's attorney that his client would receive a lengthy sentence if convicted, there was no threat conveyed." He denied relief.

[1] In a §2255 case, the district court's findings of fact are to be upheld unless they are clearly erroneous. *United States v. Strother,* 458 F.2d 424 (5th Cir.), *cert. denied,* 409 U.S. 1011, 93 S.Ct. 456, 34 L.Ed. 2d 305 (1972).

[2] Matthews places great reliance on the contents of Block's and Mandina's affidavits instead of the testimony at the evidentiary hearing. We remanded this case for an evidentiary hearing precisely because the affidavits were contradictory. At that hearing, Mandina testified substantially in accordance with his affidavit, but added that neither he nor Block viewed Sonnett's statement as a threat by the judge. Block stated that his affidavit was correct as far as it went, but that it needed

elaboration, and that he had viewed Sonnett's remark not as a threat but just as "lawyer talk." Sonnett continued to categorically deny that he had ever passed along a threat. Based on a careful review of the transcript of this testimony at the evidentiary hearing, the district court's finding is not clearly erroneous.

[3] Matthews contends that the district court erred in refusing to consider his subjective belief that a treat had been made. The law of this Circuit, however, holds that the defendant's subjective belief alone is not sufficient to invalidate a guilty plea. *See, e. g., United States v. McIntosh,* 566 F.2d 949 at 951 (5th Cir. 1978); *United States v. Maggio,* 514 F.2d 80, 88 (5th Cir.), *cert. denied,* 423 U.S. 1032, 96 S.Ct. 563, 46 L.Ed.2d 405 (1975); *United States v. Battle,* 467 F.2d 569 (5th Cir. 1972).

The First Circuit's recent decision in *McAleney v. United States,* 539 F.2d 282 (1st Cir. 1976), cited by appellant, is not to the contrary. In *McAleney,* the prosecutor ventured his personal estimate that McAleney might receive three to five years in prison. At the evidentiary hearing, the trial court found that McAleney's counsel translated the prosecutor's opinion into a Government promise to recommend such a sentence. The First Circuit held that McAleney was entitled to rely on his counsel's erroneous representation of such an agreement. But the court also noted that without his counsel's erroneous transmission of the alleged Government promise, McAleney's subjective belief would be immaterial. 539 F.2d at 284.

If Block had transmitted a Government threat to Matthews, then *McAleney* would be relevant. We need

not decide here whether we would adopt the First Circuit's position where a defendant's own attorney transmits a non-existent Government promise to his client, for we are not now faced with such a situation. The clear implication from the district court's finding is that Sonnett did not convey a threat to Block, nor did Block transmit such a threat to Matthews. Since no threat was transmitted to Matthews by the Government or by his own counsel, his subjective belief is not material. *McAleney, supra; Maggio, supra.*

[4] Finally, Matthews contends we must again remand the case because the district court did not sufficiently set forth findings of fact and conclusions of law as required by §2255. Although they might have been helpful, Matthews has not been prejudiced by the absence of more detailed findings. *See Papalia v. United States,* 333 F.2d 620 (2d Cir.), *cert. denied,* 379 U.S. 838, 85 S.Ct. 74, 13 L.Ed.2d 45 (1964).

AFFIRMED.

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 71-606-CR-PF

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

C. CAREY MATTHEWS,
Defendant.

AFFIDAVIT

STATE OF FLORIDA)
)SS
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared PHILIP J. MANDINA, who, after being first duly cautioned and sworn, deposes and says:

I am an attorney, a member of the Florida Bar, with offices located at 1710 South Bayshore Drive, Miami, Florida.

That during the approximate period 1965 through January 1972, I was a member of a law partnership with C. Carey Matthews.

On or about October 13, 1971, Mr. Matthews was indicted, along with three other parties, in a case filed in

the District Court of the United States for the Southern District of Florida, Case No. 71-606, CR-PF, charging him and the other parties with certain violations of the Securities and Exchange Acts of 1933 and 1934.

The aforesaid charges arose out of Mr. Matthews accepting a commitment in January 1968 to serve as general counsel of the State Fire and Casualty Company, Miami, Florida. Said company was in financial straits which eventually resulted in its liquidation by the Florida Insurance Department.

During this period of time, our firm also served as defense counsel, defending various liquidated suits involving the assureds of State Fire.

At the request of the President of the company, we also moved our law offices and subleased space in a building leased to State Fire and Casualty Company, however, our firm maintained separate offices in that building.

As defense counsel to represent him in the aforesaid trial, Mr. Matthews retained Irwin Block, Esquire, distinguished member of the Florida Bar with offices in Miami, and subsequent president of the Dade County Bar Association.

The indictment in question basically accused the Defendants of conspiring to violate the Securities and Exchange Acts aforementioned, and the Rules and Regulations of the Securities Exchange Commission in various ways designed to defraud the company and its assets.

Mr. Matthews served as general counsel and as an officer and director for a period of seven months, resigning on July 23, 1968. The company continued its business until April of 1969 when it was placed in liquidation. During the approximate seven months of Mr. Matthews connection with State Fire, he was absent for the best part of January and June in two separate special sessions of the Florida Legislature of which he was a member. He did not have an office with State Fire but his office was located with our law firm, and I know of my own knowledge that he conspired with no one to defraud State Fire, or to violate the laws and regulations pertaining to the Securities and Exchange Commission.

The trial in the Southern District of Florida was scheduled to come before Judge Peter Fay on or about January 10, 1972. Several days before the trial date, Mr. Matthews and I were in our law office discussing the forthcoming trial and going over the exhibits in readiness for said trial. All of the other defendants had plead guilty to certain counts of the indictment after plea bargaining and had received favorable treatment from the United States Attorney in connection with the pleas. It was clear to us that certain defendants, in particular Benjamin Dobson, the President of State Fire, were not willing to discuss the case and their testimony with our counsel, Mr. Block, or with us, although up until a few days before trial, Dobson had stated that he was prepared to testify to the truth that Mr. Matthews was not involved in any way with any conspiracy in connection with State Fire.

Suddenly, Dobson refused to return our phone calls and Mr. Block, Mr. Matthews' attorney, called this to

the attention of the court by motion for continuance. This motion was denied.

On the day in question, which I believe was January 7, 1972, as Mr. Matthews and I were discussing the case in our law office, we received a call from Irwin Block, Mr. Matthews' counsel. Mr. Block requested that both of us get on the phone on different extensions as he had important information to convey.

Mr. Block stated to Mr. Matthews and to me that he had just come from a discussion with Mr. Neal Sonnett, the Chief of the Crimes Division, United States Attorney's Office in Miami, concerning Mr. Matthews' entering a plea of guilty to at least one count of the 19 count indictment. Several such discussions had been held at prior times during the week by Mr. Block and Mr. Sonnett, but Mr. Matthews had told me and we agreed that he was going to go to trial on the case no matter what the other defendants did or what pressures were brought upon them to bring false testimony against him.

Mr. Matthews with me on the telephone on these prior occasions when Mr. Block had reported the discussions with Mr. Sonnett to us, had indicated to Mr. Block that he was ready to go to trial and wanted a trial despite whatever pressures the government could bring on the witnesses.

In this final telephone conversation, which I believe was on January 7th, Mr. Block was considerably upset and related to us that Mr. Sonnett had just advised him that he had just left the office of Judge Peter Fay, the trial judge, who had discussed with him the forthcoming

trial date and the fact that Mr. Matthews was to be the only defendant. Sonnett related that the Judge was upset about the possibilities of a trial lasting several months and that the Judge had conveyed to him that the message should be made known to Mr. Matthews and his counsel that in the event of conviction of one of the counts of the 19 count information, he would impose upon Mr. Matthews a ten-year sentence to the Federal Penitentiary. Block, myself and Mr. Matthews were stunned at this statement.

Matthews said to me, "This is hard to believe, but I can't believe that the Chief of the Crimes Division would risk deliberately lying about a threat like this from the judge. I have to believe it's true."

After further discussion, Mr. Matthews said to me, "This is a terrible threat to put on a man with three children, a one-year old, three-year old and four-year old. What would ever become of them? I can't afford to take a chance on a conviction and a ten-year sentence, especially with a threat like this. For my family's sake, I really have no alternative."

Mr. Matthews then agreed to meet with Irwin Block to enter a plea of guilty to a single count of the indictment pending against him, Count 14.

As to Count 14 of the indictment; it pertained to a violation of certain regulations of the Securities and Exchange Commission and Act in causing to be mailed certain proxy statements containing misleading information or omitting to state information which should have been placed in the proxy statements.

Actually, I know as a matter of fact that the proxy statement in question was not prepared by Mr. Matthews, it was prepared by Norman Leibling, a Chicago, Illinois attorney and outgoing general counsel of State Fire. Neither Mr. Matthews nor our office participated in any way in the distribution or disseminating of the proxy statement, which was done by State Fire and Casualty Company itself.

I know of my own personal knowledge from the discussions with Mr. Block on January 7th, as hereinabove related, and thereafter with Mr. Matthews, that Mr. Matthews would never have entered a plea of guilty of any count of the indictment, as he was innocent of all counts thereof, and only did so on the alleged direct threat relayed by Assistant United States Attorney Neal Sonnett to Irwin Block, Mr. Matthews' attorney, and thus to Mr. Matthews, that a ten-year sentence awaited him if convicted. For family reasons as above stated, he sacrificed his political and legal future. An injustice has been done here and should be righted.

FURTHER AFFIANT SAYETH NOT.

/s/ Philip J. Mandina
Philip J. Mandina

SWORN to and SUBSCRIBED before me
this 10 day of June, 1975.

/s/ Donna B. Wallace
NOTARY PUBLIC, State of Florida at Large
My Commission expires: Feb. 10, 1976

APPENDIX "F"

STATE OF FLORIDA
COUNTY OF DADE

Before me, the undersigned authority, personally appeared IRWIN J. BLOCK, who, being by me first duly sworn, did depose and say:

1. In 1971 and in January of 1972, he was representing Carey Matthews in connection with a case pending in the United States District Court before the Honorable Peter T. Fay, United States District Judge, involving Carey Matthews and other defendants.

2. On the eve of trial, the undersigned was contacted by Neal Sonnett, Assistant United States Attorney, and to the best of undersigned's knowledge, advised that the Court had indicated to him, Mr. Sonnett, that if Carey Matthews went to trial and was found guilty, he would be sentenced to a substantial term of years, the exact number of which Affiant does not remember today, but which he believes to be in excess of ten years.

3. Your Affiant immediately conveyed this information to Carey Matthews who, thereafter decided to plead guilty, rather than take the chance of being sentenced to the time indicated by the Assistant United States Attorney.

Further, Affiant saith not.

/s/ Irwin J. Block
IRWIN J. BLOCK

Sworn to and subscribed before me
this 11th day of June, 1975.

(Signature Illegible)
Notary Public State of Florida at Large
My commission expires Mar. 9, 1977

APPENDIX "G"

WALL STREET JOURNAL
APRIL 24, 1974

Under the Gun

As Feds Closed In,
Promoter Closed Deal
With Top Nixon Aide

Mort Zimmerman Bought
LaRue Family Business,
Put LaRues on Payroll

Did Prosecutors Go Easy?

By JONATHAN KWITNY
Staff Reporter of
The Wall Street Journal

From 1969 to 1972, S. Mort Zimmerman of Dallas, Texas, may have been the nation's most investigated businessman.

He or some of his corporate enterprises were indicted, enjoined, delisted, suspended or fined by courts, enforcement agencies and a stock exchange. But in January 1972, he struck a bargain with the Justice Department and pleaded guilty to a few of the criminal charges against him.

To the consternation of agents from the Securities and Exchange Commission, the Federal Bureau of Investigation, the Comptroller of the Currency's office, the

Postal Service and various state agencies, Mr. Zimmerman never went to prison. Now, a few investigators are beginning to think that somebody pulled strings on Mr. Zimmerman's behalf.

Their evidence — based on matching old SEC files with developments in the Watergate scandal — is only circumstantial. And one SEC man thinks that Mr. Zimmerman may have got off merely because a federal prosecutor was willing to deal with Mr. Zimmerman in return for evidence that would convict another man and better enhance the prosecutor's political ambitions. Mr. Zimmerman himself says he avoided jail fair and square, largely because his violations were only technical.

Still, the evidence solidly links Mr. Zimmerman in a multimillion-dollar deal with Fred C. LaRue and members of his family.

On Mr. Zimmerman's Payroll

Mr. LaRue, as a top aide to Nixon campaign chief John Mitchell, his chief political mentor since 1968, performed duties that included such delicate chores as helping to destroy incriminating evidence and to deliver "hush money" to Watergate burglars, for which he pleaded guilty to conspiracy to obstruct justice. Earlier, as a high-level consultant to President Nixon, Mr. LaRue was unsalaried. But he by no means went uncompensated. While he worked for the President, and while investigators from many agencies were closing in on Mr. Zimmerman, Mr. LaRue, his brother and his brother-in-law were drawing $100,000 a year from a company controlled by Mr. Zimmerman. The LaRue

group had a large stock interest in the company. And Mr. Zimmerman, through stock purchases and a big bank loan, funneled them additional chunks of cash.

The LaRue group got into this position through the sale of its debt-ridden family concern. Larco Drilling Corp. to Mr. Zimmerman's Capital General Corp. (then Capital Bancshares Inc.) in April 1968. The investigations of Mr. Zimmerman had been intensifying for nearly a year by that time. Larco, a Gulf Coast oil and gas firm, had been founded by Fred LaRue's father, I. P. LaRue, Sr., who was accidentally shot to death by Fred LaRue in a hunting mishap. By 1969 Larco was owned by Fred LaRue; his brother, I. P. (Ike) LaRue Jr., and Fred LaRue's brother-in-law, Harry Owen.

At the time they sold it to Capital General, Larco's assets were valued at $3,700,493 (including a $390,000 loan to Messrs. LaRue and Owen), its liabilities at $3,753,335. Mr. LaRue says the deficit may have resulted from valuing the assets (mainly drilling equipment and some oil property) at cost rather than market value, though he says that he isn't sure now. In any case, Mr. Zimmerman's Capital General gave the LaRue family 22,085 shares of Capital General, worth nearly $2 million based on their $9-a-share bid price in the over-the-counter market, in return for Larco.

A $750,000 Loan: Easy Terms

But in a complex fashion characteristic of many of his business deals, Mr. Zimmerman sweetened the pot considerably for the LaRue family. He arranged with his banker, Roger B. Mize, to let Mr. LaRue and his relatives borrow $750,000 from a Texas bank of which

Mr. Mize was chairman. A Capital General subsidiary bought $350,000 in certificates of deposit from two other banks with which Mr. Mize was associated to induce the loan. Collateral of 82,500 shares of Capital General was put up, presumably by the LaRue family, though records and memories now are unclear on the subject. Still, Capital General was committed to repay the loan if the LaRue family didn't.

Of the $750,000 the LaRue family members were permitted to borrow they used $390,000 to repay the money Messrs. LaRue and Owen had borrowed from Larco. They lent Larco another $200,000. They kept the remaining $160,000, Mr. LaRue says.

Finally, Capital General agreed to employ Mr. LaRue and his relatives for a total of $100,000 a year, to be divided as they chose, and to insure them stock options, which never were exercised because the price on Capital General stock fell. Mr. LaRue became president of Capital General's new Larco subsidiary.

Troubles, but a Pay Raise

The deal looked good at first. Then it soured. By March 1970, the price on Capital General stock had fallen to $3 or $3.50 a share. The LaRues' Capital General shares, once worth about $2 million, then were worth no more than $677,000, although their bank loan had been reduced $200,000 by installments paid by Capital General under the original agreement.

Despite his own troubles, Mr. Zimmerman stepped in and had Capital General offer to buy back for $750,000, or $12.50 a share, the 62,500 Capital General

shares still held by the bank as collateral for the LaRues' loan. This offer, had it been carried out, would have more than repaid the LaRues' remaining debt. While the LaRues considered this offer, Capital General also offered to upgrade the dwindling value of the LaRues' loan collateral by adding stock in Capital General subsidiaries. And Capital General offered to raise to $160,000 a year from $100,000 the compensation to the LaRues.

Throughout this 1969-70 period, Mr. Zimmerman was in trouble. The same month he made the Larco deal, State Fire & Casualty Co., a Miami-based insurer that had been a subsidiary of Capital General until 10 months earlier, went bankrupt. It folded after a complicated deal involving Mr. Zimmerman and Edward Wuensche, who had been convicted of fencing stolen stock and who had detailed his Mafia ties in congressional testimony. The deal resulted in State Fire's valuable assets being replaced by worthless securities. During the 18 months Mr. Zimmerman controlled State Fire, he transferred $1.5 million of its liquid assets to Capital General in exchange for stock in a Capital General subsidiary. He took back this stock when he sold State Fire and arranged for Wuensche to replace it with securities that turned out to be worthless. Besides setting the stage for State Fire's bankruptcy, this brought the investigators down on Mr. Zimmerman.

He faced other setbacks. The Comptroller's office was pressuring him to yield control of a chain of banks that Capital General owned. Their questionable loans allegedly had created big losses. Mr. Zimmerman had contracted to sell his flagship bank, Capital National of Miami. But the Comptroller's office was unhappy

because the chosen buyer was a Netherlands Antilles-based mutual fund run by Allen Lefferdink, a controversial offshore-fund promoter whose Colorado financial empire had been brought down already by the SEC.

In April 1969, the same month he made the Larco deal, Mr. Zimmerman's Capital General sold control of its Underwriters Trust Co., New York. Later, in testimony at a congressional hearing, it was disclosed that under Mr. Zimmerman's control, Underwriters Trust had accepted as loan collateral more than $1 million in stolen securities.

And also about the time of the Larco deal, the insurance departments of Florida and Arkansas, along with the U.S. Postal Service, were contemplating action against Mr. Zimmerman over the bankruptcy of North American Guaranty Insurance Co., Little Rock. Some 16,000 policyholders had been stripped of their protection when North American's assets evaporated during a stock swap involving Capital General.

The American Stock Exchange and the SEC were keeping a close eye on Mr. Zimmerman's Intercontinental Industries conglomerate because of the involvement of a prominent Mafia figure, Michael "Big Mike" Polizzi. Later, in the summer of 1969, the Amex and the SEC accused Intercontinental of issuing false publicity releases. Mr. Zimmerman consented to a civil-court injunction against fraud. Trading in the stock was suspended in June 1969. The Justice Department, which handles criminal prosecutions for federal investigative agencies, was beginning a probe into Mr. Zimmerman's affairs.

White House Pass

Throughout this period — the spring and summer of 1969 — and, in fact, up until early egory of special projects." A wealthy Mississippian and longtime Republican leader, Mr. LaRue had contributed early to Mr. Nixon's 1968 campaign and become a top aide to John Mitchell, who ran the campaign. After the 1968 election, Mr. LaRue went to work directly for the President, and Mr. Mitchell, of course, became Attorney General.

Though Mr. LaRue wasn't a full-time employe of the President's, he had a White House pass, and he was supposed to be available at all times for assignment. According to a White House spokesman, the only comparable post under Mr. Nixon was that held by former Treasury Secretary John Connally when he returned to Washington last year to assist the President. But Mr. Connally, unlike Mr. LaRue, was barred from outside work while he served as special consultant.

(Early in 1972, Mr. LaRue left the White House to work under Mr. Mitchell again in the Nixon campaign. This work led him into the Watergate cover-up. He pleaded guilty on June 27, 1973, to conspiracy to obstruct justice. Sentencing has been delayed until he completes his testimony against other defendants.)

Mr. Zimmerman's connection with a top Nixon strategist, whatever other value it may have had, did little to stop the downhill side of his business ventures. And Capital General's stock plummeted. On Sept. 15, 1970, a year and a half after the Larco deal, it hit $1.75 bid. On that date the LaRues ended their employment

agreement with $180,000 having been paid. But Larco, still a Capital General subsidiary, bought back from them 18,634 shares of Capital General stock at $6 a share, for a total of $111,804, to cover debts the LaRues had incurred, and Larco agreed to buy back from the family another 105,000 shares at $6 in installments. Also, the LaRue group was released from all liability for the $750,000 bank loan. Capital General stock continued to fall in the open market, hitting $1 bid on Nov. 19.

"Washington Pulled the String"

Mr. Zimmerman's legal troubles were coming to a head, too. On April 30, 1971, he and four associates were indicted by a federal grand jury in Miami on 19 counts of mail and securities fraud involving Capital General's looting of State Fire. In December 1971 the grand jury added a charge that Mr. Zimmerman attempted to bribe an assistant U.S. attorney with $40,000 to win dismissal of the first indictment.

A month later, investigators were shocked to learn that Mr. Zimmerman had negotiated a high-level Justice Department deal. He was allowed to plead guilty to four counts, for which he was fined $30,000, put on probation and given immunity from all other charges. The deal took place in January 1972, when Messrs. Mitchell and LaRue were preparing to move from the Justice Department and the White House, respectively, to the Committee to Re-Elect the President. The arrangement was made by Assistant U.S. Attorney Neil Sonnett in Miami, but it was overseen by Robert Hickey, supervisor of the criminal fraud section of the Justice Department in Washington.

Mr. Hickey flew to Miami for the negotiations. He and Mr. Sonnett agreed to let Mr. Zimmerman plead guilty to the handful of charges in return for a light sentence and dismissal of the other charges.

"Somebody in Washington pulled the string on us," says Kathryn Gregory, a lawyer who recently retired as an official of the Florida Insurance Department. "I think it had to be through LaRue. We spent years working on that case," Irving Bober, another attorney for the department, also cites the LaRue connection as a factor in Mr. Zimmerman's probation. "It was a Washington deal," he says. "My best judgment is that everybody knew what was going on down here (in Florida)." he says.

Was Society Cheated?

In Washington, the Justice Department declines to comment, but some individuals involved dispute any suggestion that Mr. LaRue influenced the settlement. Mr. Sonnett, now a Miami attorney, says he had to persuade the Justice Department to agree to it. He says he considered it simply on its merits.

David Ross, an SEC attorney, protested the settlement. But he says he thinks the LaRue connection had nothing to do with it. He says it came about because Mr. Zimmerman had promised to testify against a co-defendant, Carey Matthews, a prominent Florida legislator, against whom evidence was weak. He says that Mr. Sonnett, the assistant U.S. attorney in Miami, was more interested in convicting a local politician — Mr. Matthews — because Mr. Sonnett was about to quit his job to run for state office and the Matthews' convic-

tion would be a feather in his cap. Mr. Sonnett did quit to seek the Democratic nomination for state attorney in Dade County — and lost; he says the handling of the Zimmerman case had nothing to do with his political aims. And Mr. Ross says higher officials in the Justice Department, rather than wanting to let Mr. Zimmerman get off, had preferred a two-year jail sentence.

But the federal judge in the case, Peter Fay, was uneasy about the settlement. "I was very upset about the plea bargaining procedure because it made the court into a rubber stamp," he says. If the defendants were guilty of all the charges, he said at the time, "our judicial system and society have been cheated." Judge Fay says he went along with the agreement made by the prosecutors because Mr. Zimmerman and his codefendants had exposed themselves by offering evidence and otherwise living up to their end of the deal. He says he didn't learn about the LaRue connection until long afterward.

Mr. Zimmerman is coy about the LaRue connection. "He knew I had problems with the government," he says of Mr. LaRue. "He knew they were fishing around my office for everything they could find. I always told him I am a man who likes to meet with people, anybody in government. I never had the opportunity. I think he might have discussed it with people he knows, but I never talked (to them)."

The LaRues Get Out

Mr. LaRue doesn't exactly remember it that way. "I don't recall him ever bringing the subject up," Mr.

LaRue says, "and I wouldn't have (interceded) anyway."

(However, a former FBI agent, William F. Higgins Jr., says he suspects that the Larco deal may have influenced orders he got to stop investigating a Cleveland businessman with close ties to Mr. Zimmerman. The agent was fired from the FBI after he kept probing for fraud in several large bankruptcies involving the businessman. The Justice Department says Mr. Higgins SEC civil fraud injunctions in the case, and he is suing for reinstatement.)

Mr. Zimmerman pleaded guilty in January 1972. In the same month, Capital General sold all the non-cash assets of Larco to Transcontinental Oil Corp., a New Orleans-based firm, for 225,000 shares of Transcontinental stock, then worth about $540,000, and $2.5 million in notes. The shares since have risen to about $1.2 million, but most of the stock and notes went into an escrow account to pay off Larco creditors, says R.A. Oxenreiter, vice president of Transcontinental Oil. "When we bought (Larco), it was for all practical purposes bankrupt," he says.

A few months later, on April 12, 1972, Capital General turned over to Mr. LaRue and his relatives 25,000 shares of Transcontinental Oil. The family, in turn, agreed to return 6,000 shares of their remaining holding in Capital General, releasing them from all remaining debts and obligations under the original deal. By that time, the $750,000 loan to the family by Mr. Mize's bank had been paid down to $433,215.64 by Capital General. Mr. Zimmerman says he doesn't know exactly how the loan stands now.

APPENDIX "H"

Sonnett-Cross

THE WITNESS: If I may say, Judge, since this controversy concerning the two affidavits of Mr. Block and myself has come up, I want to clearly state that Mr. Block and I have had several conversations since that controversy.

I think that we have a fairly decent recollection of this case at this point as to what took place, although neither one of us remember the words. I think that in fairness to Mr. Block that I ought to say that I can understand the circumstances under which Mr. Block might have gotten this impression from anything I said. But I think that it should clearly say at no time did I ever indicate to Mr. Block the things that have been set out in the affidavits filed by Mr. Mendina and Mr. Matthews.

REDIRECT EXAMINATION

BY MR. GREENFIELD:

Q What did you say that may have given Mr. Block the impression that he indicated in his affidavit?

A The only thing that I can think of is the statements that I recall that I may have made and probably made on several occasions to all of the defendants that the Court looked dimly on these kind of crimes. But there is a far cry between that and saying what appears in Mr. Mendina's affidavit; for example, that Judge Fay asked me to pass on a message to the defendant. That is

absurd. And I clearly deny that. And I deny that I ever in any way tried to insinuate to Mr. Block or anybody else that might have happened.

I respect Mr. Block a great deal and I think that he is an outstanding lawyer and had a great deal of integrity. And I am sure that the wording of Mr. Blocks affidavit, although he never says that I said that in his affidavit, but the wording that he believed that the Court had indicated to me, may have been caused by a misimpression as to what I said.

Q Well, let me read you exactly what he said in his affidavit. "On the eve of trial the undersigned's was contacted by Neal Sonnett, Assistant United States Attorney, and to the best of the undersigned's knowledge advised that the Court had indicated to him, Mr. Sonnett, that if Carey Matthews went to trial and was found guilty he would be sentenced to do a substantial term of years, the number of which, the affiant does not remember today, but which he . . . . that I knew something from the Judge. But I did tell him what I thought I would recommend, what I thought that Mr. Matthews would get, as I do with all defendants.

Q Well, Mr. Sonnett, you know Mr. Block to be experienced and a long time criminal lawyer, don't you?

A Yes, sir, I do.

Q And at the time of this trial he was or at the time of your conversation he was a seasoned, experienced criminal lawyer?

A He was, yes, sir.

Q Now, you would not expect Mr. Block to relate or misunderstand any implication that you made by him having said the Court had indicated that thinking, that that indication that just came from your memory, would you?

A I think that that question is better put to Mr. Block. I can tell you that my respect for Mr. Block leads me to the firm conclusion that had a prosecutor said anything like that to him and indicated that the Judge had passed along such a message, that Mr. Block would have gone right to the Judge and at least confronted that Court with it, and if that were . . . .

Q I understood from your previous testimony, or your questions on direct examination, that you said that Mr. Block said that he didn't think Judge Fay had made the statement.

A I didn't believe it, either.

MR. BATES: You may inquire.

REDIRECT EXAMINATION

BY MR. GREENFIELD

Q Immediately after that information you had a discussion with Mr. Matthews, didn't you?

A Yes, sir.

Q And immediately after that discussion Mr. Matthews decided that he would plead guilty, and he went to see Mr. Block; is that right?

Q Mr. Mandina, I show you an affidavit and the signature on that affidavit which is dated the 10th of June, 1975 and I ask you if that is your signature?

. . . . some manner there had been some indication to Neal that there would be a substantial number of years in the event that he was found guilty.

Q Now, this impression that you had disturbed you, didn't it?

A I don't know what you mean by "disturbed me."

Q You went right to the telephone and you called up Mr. Matthews?

A Yes. As I do when I hear anything of that nature from any prosecutor.

Q And you conveyed to Mr. Matthews in that telephone conversation that impression, didn't you?

A What impression? The impression that I got from Mr. Sonnett?

Q The impression that you had gotten from Mr. Sonnett that the Court had indicated that in the event of a finding of guilty, a long prison term would follow.

A I did convey that and I also told Carey at that time, if I can remember, that I don't know if the Court had said it or whether this was Neal talking or whatever it is, but I wanted him to . . . .

A He wanted to plead guilty, then under those circumstances that was a pretty good deal.

Q And you would not have taken any steps before Judge Fay to upset that deal, would you?

A No, sir.

Q Did you have any further discussions before your appearance before Judge Fay with Mr. Sonnett about that impression that you had gotten from him as to the indication from Judge Fay?

A Not that I can recall.

Q So then as a matter of fact, even after refreshing your recollection as to your testimony and your cross examination, I would like to ask you now, I want to read this statement to you again and ask you that in light of everything now, if it is still a true statement: "On the eve of trial the undersigned was contacted by Neal Sonnett, Assistant United States Attorney, and to the best of the undersigned's knowledge, advised that the Court had indicated to him, Mr. Sonnett, that if Carey Matthews was tried and was found guilty, he would be sentenced to a substantial term of years, the exact number of which affiant does not remember today, but which he believes to be in excess of ten years."

A That is the same thing that I have been telling you I think for the last hour or thirty minutes, how ever long we have been here. That is true and it required the elaboration that you or Mr. Gates have brought out.

BY MR. GREENFIELD:

Q Now, Mr. Mandina, did you and Mr. Matthews have several calls and discussions with Mr. Block on that date?

A I only remember the one.

Q Well, would you please tell us what your recollection is as to that conversation?

A Well, Mr. Block called and indicated that he had had a discussion with Mr. Sonnett and that Mr. Sonnett had indicated to him that Judge Fay had indicated to Mr. Sonnett that if Mr. Matthews was convicted on any one count he would get at least, I believe, ten years in prison. And in view of the fact — that fact — what did Mr. Matthews want to do. And he felt that that was important that he knew that occurred.

Q And did Mr. Block indicate that there was any question in his mind that the information that he was conveying on to Mr. Matthews was information which in reference to an indication or a statement made by Judge Fay was passed on through Neal Sonnett?

A Well, I don't think that he could evaluate whether Judge Fay had made the statement. We all obviously believe that Judge Fay did made the statement. The question then became, had he, or how did he find out, or whatever. And we asked Mr. Block that. "What did you think?" And he said, "Well, I don't think he made the statement, but I don't know." And I believe that was the tenor of the conversation. He did not know whether Judge Fay had made the statement or not.

Q But he indicated that Sonnett had told him that the statement had been made or an indication had been made?

A That is what he said. He said the Judge told that to Mr. Sonnett.

MR. GREENFIELD: I have no further questions, Your Honor.

. . . . in the form of a threat that the judge wanted to convey to the defendant somehow?

A I don't know whether to say I felt that it was a threat, because I don't know what sentence you could get for what was in the indictment.

In other words, it may be ten years, it may be that Judge Fay thought that was a light sentence. I did not feel that way. I thought that it was threatening in nature. Mr. Block conveyed that to me. I mean, that was the purpose of the call.

Q But you had a discussion, as I understand from what you said before, that Mr. Block said he could not evaluate whether Judge Fay had made the statement, but he did not think he had made it.

A No. I said that Mr. Block could not have evaluated it. I assume he evaluated it for himself.

Q But I understood from your previous testimony here that you said that Mr. Block said that he didn't think Judge Fay had made this statement.

A I believe he did indicate that when I asked him. I said, "Well, Irwin, what do you think about all that?" and he said, "Well, I don't think that he made the statement; but I don't have any way. . . .

THE WITNESS: Where you plead guilty but you are not guilty, or you say that you are not guilty. No, at one point I am sure he said, "I can plead, you know, under North Carolina, and I would not be sentenced. I will get probation."

I am sure he told me that, but, you know, at that time it was — I don't know, it was kind of like over.

Q I beg your pardon?

A It was over then. If I am not mistaken, he may have pleaded that same day. If I am not mistaken, the call came in in the afternoon and he made up his mind and that was the end of it.

Q In any event, in the call from Mr. Block, Mr. Block did not say, in complete, unqualified language, that Judge Fay had conveyed a message to Mr. Sonnett through Mr. Block to Mr. Matthews that the defendant Matthews, if he went to trial and were convicted, would get at least ten years?

A He said specifically that he had a discussion with Mr. Sonnett and Mr. Sonnett had talked to Judge Fay and Judge Fay had indicated to him that if Matthews was found guilty on any one count he would give him at least ten years in jail.

A Yes, sir.

Q And Mr. Mandina, in your affidavit you said this, and I would like to ask you if you still believe that statement to be true:

"I know from my own personal knowledge from the discussions with Mr. Block on January 7th as hereinabove related and thereafter with Mr. Matthews, that Mr. Matthews would never have entered a plea of guilty to any count of the indictment as he was innocent of all counts thereof, and only did so on the alleged threat relayed by Assistant U.S. Attorney Neal Sonnett to Irwin Block, Mr. Matthews' attorney, and thus to Mr. Matthews, that a ten-year sentence awaited him if convicted."

Do you believe that is still a true statement?

A Unequivocally, I believe it.

MR. GREENFIELD: No further questions.

THE COURT: Do you wish to cross on that? It seems like it was a new area.

MR. BATES: Yes, your Honor, I would.

RECROSS EXAMINATION

BY MR. BATES:

Q What is the basis of that statement?

A Just prior to the call, Mr. Bates, we had thoroughly discussed and decided, because we were partners for a number of years, that certainly it was probably the most, obviously the most damaging and toughest thing that ever happened to Carey during our partnership. The other defendants who prior to this, particularly Ben Dobson, had indicated that they would support Matthews and that their testimony would be favorable to him, and particularly Dobson. We could not find him the last few days before trial. He . . . .

Q Mr. Matthews, on the 7th, when you received the telephone call from Mr. Block, what conversation did you have with him?

A He came on the phone extremely perturbed and upset. The whole week he had been upset and perturbed. There was some 10,000 documents and he was terribly concerned about whether or not we were ready for trial. He came on the phone and he stated that he had just had a conference with Neal Sonnett and he said that he was very upset, that Sonnett had related to him that Judge Fay had threatened a ten year sentence to me if I went to trial, the only person going to trial, and if I was convicted.

That is what — I don't know how I can characterize it — I accepted it as a threat to put me in jail for ten years if I was convicted on any count or any number of counts.

Q Did he express it as an impression that he had gained from Sonnett or did he express it as a statement that Sonnett had told him that such and such information was conveyed to him by Judge Fay?

A He flat out stated unequivocally. . . .

. . . .months to run on the five years, and after which time you will be entitled to be reinstated to the Florida Bar, if the Court sees fit to vacate your plea, and permit you to enter a plea of not guilty at this time, are you ready to face the rigors of a trial and to do those things that are necessary to defend yourself and prove your innocence?

A Absolutely. I am prepared to go to trial within ten days. I think that I have a right to a trial. After all, that is all that I am asking is a trial. I think the public has a right for me to be tried and they have a right to know whether I am innocent or guilty. I think the Court has a right to know whether they have been put upon in this case, as they have, in my opinion.

Q Mr. Matthews, did you have anything whatsoever directly or indirectly to do with the mailing or the preparing or the distribution of a proxy statement under which you were charged on Count XIV?

MR. BATES: Objection, Your Honor.

THE COURT: Sustained.

MR. GREENFIELD: No further questions.

THE COURT: Cross examination. . . .

A Yes, sir.

Q And also in causing individuals to change their testimony?